No. 47941-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES KELLY,

Appellant,

v.

CAVALRY PORTFOLIO SERVICES, LLC,

Respondent.

On Appeal from Clark County Superior Court
No. 15-2-01097-6

REPLY OF APPELLANT JAMES KELLY

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I. INTRODUCTION

How many Cavalry SPV I LLC lawsuits were filed against Washington consumers who weren't sure who owned their accounts? How many of those consumers needlessly spent time and money trying to figure it out? How many judgments were taken against consumers who didn't respond to the lawsuit because they believed another company owned their account—or who might have paid off the accounts if they had known who to pay?

Respondent Cavalry would have this Court review the decision below under the premise that this case is about "the sending of a single notice letter" regarding a debt that Appellant Kelly "never made any payment on." *(Resp. Br. p. 1).* Respondent also asks this court to find that this one "immaterial mistake" on Cavalry's part was not a deceptive or unfair act under Washington law. *(Id., p. 2).* The premise is false, the question is much larger, and the answer is much more important because of the potential public interest impact.

This case is actually an action for Injunctive Relief for Violations of the Consumer Protection Act, Inter Alia *(CP 1),* which could potentially provide relief to thousands of Washington consumers. *(CP 7:9-21).* The proper inquiry is whether the letter in question had the "capacity to

deceive a substantial portion of the population"[1]—not whether sending it was a single unfair or deceptive act.

II. RESTATEMENT OF FACTS

Cavalry provides an incomplete summary of the facts of this case. The facts as pled illustrate violations of the Washington Consumer Protection Act.

A. CAVALRY'S NOTICE LETTERS AND LAWSUIT

A review of the record will reveal that Respondent Cavalry—which services and collects debts purchased by Cavalry SPV I, LLC[2]—sent a letter to James Kelly, a credit card consumer, informing him that **Cavalry Investments, LLC** had purchased his Bank of America account, when in fact, it had not. *(CP 3:20-4:7), (CP 70:14-20).* That same letter informed Mr. Kelly that his account had also been referred to **Cavalry Portfolio Services, LLC** for collections. *Id.* Seven months later, Mr. Kelly received a letter from a law firm regarding the same account with **Cavalry SPV I LLC** in the subject line. *(CP 40:1-15), (RP 7:3-6).*

As the Court in the lawsuit against Mr. Kelly stated, "three Cavalrys running around." *(CP 22:9).* The trial court in the instant case also commented on the problematic nature of three different companies with the same first name. *(RP 15:23-16:2).*

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[1] *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).
[2] *(Resp. Br. p. 3).*

Mr. Kelly—a reasonable consumer—was confused, and before he was able to sort whether he did indeed owe money to one of these companies—and if so which one—Cavalry SPV I LLC sued him. *(CP 4:12-23).*

Mr. Kelly filed an Answer to the lawsuit informing Cavalry SPV I LLC that it did not own Mr. Kelly's account. *(CP 5:9-14).* Prior to Mr. Kelly's Answer, Cavalry knew or should have known that it had sent a letter to Mr. Kelly identifying the wrong owner of the debt. After the Answer was filed, Cavalry was formally on notice that there was substantial confusion as to who owned the account, yet it proceeded with litigation—as far as summary judgment—knowing that Mr. Kelly claimed the offending letter as a defense, and without ever explaining its mistake or clarifying the discrepancy between the collection letter and the lawsuit. *(CP 6:13-21).* To this day, Cavalry has not explained who Cavalry Investments is, or why that name might have appeared on its collection letters.

B. KELLY'S COMPLAINT

The instant case is about more than just one letter mailed to Mr. Kelly, and is more than a "single cause of action." *(Resp. Br. p. 4).* Mr. Kelly's Complaint alleges that Cavalry's letters to Kelly and other consumers were deceptive and that Cavalry's practices and conduct were

unfair in light of its knowledge that the deceptive letter(s) were sent. Mr. Kelly asserts, *inter alia,* the following:

1. It was deceptive to mail Mr. Kelly and other Washington consumers an Initial Demand Letter stating that Cavalry Investments purchased Mr. Kelly's account when that was an untrue and materially misleading statement. (CP 9:19-22).

2. It was unfair for Defendants to vigorously prosecute a debt collection lawsuit against Mr. Kelly despite knowing about the misleading and mistaken debt collection letter that preceded the lawsuit. (CP 9:22-25).

3. It was unfair for Defendants to prosecute other debt collection lawsuits against other Washington consumers knowing about the misleading debt collection letters that preceded those other debt collection lawsuits. (CP 10:1-4).

4. It was unfair and deceptive for Defendants to obtain default judgments against other Washington consumers despite knowing about the erroneous and misleading debt collection letters that preceded Defendants other debt collection lawsuits. (CP 10:7-9).

5. It was unfair and deceptive for Defendants to fail to vacate the other erroneously obtained default judgments that Defendants obtained against other Washington consumers using the misleading Initial Demand Letters followed by lawsuits in the name of a different entity. (CP 10:13-18).

6. It was unfair and deceptive for the Defendants to never disclose during the debt collection lawsuit that Defendants' Initial Demand Letter was a mistake. (CP 10:22-24).

7. It was unfair and deceptive for Defendants not to inform the other similarly affected Washington consumers about the true owner(s) of their accounts. (CP 11:1-3).

Mr. Kelly's prayer for relief includes a request for an injunction preventing Defendants from ever again mailing a deceptive debt collection letter to another Washington consumer. *(CP 13:1-3).* Mr. Kelly does not want Defendants to feel free to continue to cause other Washington consumers to needlessly lose time and money trying to figure out Defendants' "mistakes".

C. CAVALRY'S MOTION FOR JUDGMENT ON THE PLEADINGS

Cavalry's motion argued that Mr. Kelly could not meet the necessary public interest element of the CPA. Cavalry incorrectly advised the trial court that the case had to fit a consumer transaction "analytic framework" to determine whether a public-interest impact exists. *(CP 408:16-409:10).*

This is the wrong analysis. As Mr. Kelly argued, the court was only required to find that the act or practice has a capacity to deceive the public as a whole.[3] *(CP 395:18-23).*

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[3] *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 787, 295 P.3d 1179 (2013), *Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885, 895 (2009).*

III. ARGUMENT

A. THE PROPER INQUIRY IS WHETHER CAVALRY'S NOTICE LETTER HAD THE CAPACITY TO DECEIVE A SUBSTANTIAL PORTION OF THE POPULATION

Cavalry's argument regarding a prototypical unfair or deceptive act under the CPA is inapposite. Of course Cavalry's letter doesn't "misrepresent the source, quality, or price of a service or product." *(Resp. Br. p. 9).* That is obviously the wrong test. The test is whether Cavalry's collection notice had the capacity to deceive a substantial portion of the population—and the determination of that capacity is a question of fact.

The analysis of whether an act is unfair encompasses the analysis of whether an act is deceptive. "Business practices that are 'deceptive' are, ipso facto 'unfair'."[4] And the proper analysis of whether an act is deceptive is whether it has the "capacity to deceive a substantial portion of the population."[5] Finally, "[w]hether a deceptive act has the capacity to deceive is a question of fact."[6] As for determining whether conduct affects the public interest, "this element is also factual in nature."[7]

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[4] *Panag v. Farmers Ins. Co. of Wash.,* 166 Wn.2d 27, 50, 204 P.3d 885, 895 (2009).

[5] *Klem,* 176 Wn.2d at 787 (2013).

[6] *Behnke v. Ahrens*, 172 Wn.App. 281, 292, 294 P.3d 729, 735 (2012)(citing *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC* 134 Wash.App. 210, 226-27, 135 P.3d 499 (2006), review denied, 160 Wash.2d 1019,163 P.3d 793 (2007).

[7] *Id. at 293* (citing *Hangman Ridge,* 105 Wash.2d at 791, 719 P. 2d at 531).

At oral argument on Cavalry's Motion, Mr. Kelly's counsel argued that Mr. Kelly only need show that the unfair or deceptive act had the capacity to deceive. *(RP 15:8-12), (RP 16:13-16).* A fact finder could and likely would find this capacity as it relates to Cavalry's letter. By Cavalry's own admission, its letter could feasibly have been sent to tens of thousands of consumers. *(CP 7:9-21), (CP 30:14-17) (CP 46:13-20).*

The trial court made no analysis of whether this practice had the capacity to deceive the public. The court was solely focused on whether Mr. Kelly was deceived. In fact, the court surmised that Mr. Kelly "knew to pay Cavalry Portfolio because they were the servicing agent for a debt owned by Cavalry SPV." *(RP 13:24-14:1).* Kelly's counsel pointed out that Mr. Kelly did not, in fact, know who to pay. *(RP 14:2-4)*—and this is the main point of contention here—the fact that the letter deceived Mr. Kelly and had the capacity to deceive the larger population because it was misleading and confusing. The court made an assumption that Mr. Kelly—after receiving a letter stating that Cavalry Investments owned his account—would somehow know that Cavalry Portfolio is the servicing agent for Cavalry SPV, and that this knowledge would lead him to the conclusion that he should pay Cavalry Portfolio.

This type of analysis and conclusion would seem to impute a level of knowledge and sophistication upon the reasonable, ordinary Mr. Kelly

that is not supported by Washington law. "Our Supreme Court has said that actionable deception exists where there is a practice likely to mislead a "reasonable" or "ordinary" consumer.[8]

B. RCW 4.08.080

Mr. Kelly's discussion of RCW 4.08.080 is to illustrate the importance of correctly naming the owner of an account in a collection notice.[9] RCW 4.080.080 is meant to protect a consumer who is told that one company owns his account and thereafter he is sued by a different company. Indeed this issue of standing ultimately defeated Cavalry SPV's lawsuit against Mr. Kelly. Cavalry SPV's voluntary dismissal is indicative of its awareness that two different "owners" of Mr. Kelly's account would prove problematic for its case.

C. BONA FIDE ERROR AND GOOD FAITH DEFENSES

Mr. Kelly objects to the trial court's statement that it was "going to grant the motion as a matter of law an unintentional and bona fide error, and does not result, in this case, in a deceptive or unfair act." (RP 20).

There was simply no basis in law or fact for the trial court to apply the FDCPA's bona fide error defense to this Consumer Protection Act lawsuit. Cavalry did not assert the defense. Mr. Kelly asks this court to

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[8] *Behnke v. Ahrens*, 172 Wn.App. 281, 293, 294 P.3d 729, 736 (2012)(citing *Panag v. Farmers Ins. Co.* of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009)).

[9] *(App. Br. 13-14).*

reverse the trial court and remand this case back to the trial court for further proceedings.

A CPA claimant is not required to demonstrate intent.[10] Cavalry did not assert a good faith defense and the trial court's order, which includes a finding that Cavalry's conduct was unintentional, represents a clear error of law and should be reversed to avoid prejudice to Mr. Kelly and a substantial number of other Washington consumers.

IV. CONCLUSION

The trial court erred in concluding that Cavalry's letter was not unfair or deceptive. The trial court erred when it failed to analyze whether the letter had the capacity to deceive a substantial portion of the public.

The trial court erred when it included a statement its ruling that Respondent had made an unintentional and bona fide error. The trial court erred when it granted, as a matter of law and without any findings of fact regarding the capacity of Cavalry's letter to deceive a substantial portion of the public, Respondent's Motion for Judgment on the Pleadings.

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[10] *Sing v. John L. Scott, Inc.,* 134 Wn.2d. 24, 30, 948 P.2d 816, (Wash. 1997) ("plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.")(quoting *Hangman Ridge,* 105 Wash.2d at 785, 719 P.2d 531 (footnote omitted).

The trial court should be reversed and this case should be remanded back to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 22nd day of April, 2016.

/s/Robert W. Mitchell
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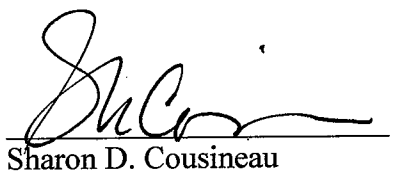

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